United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-6170

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA, :

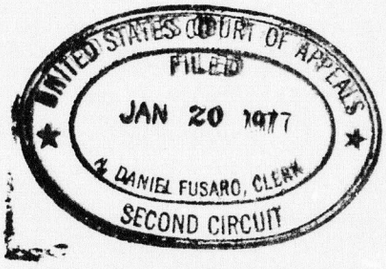
Plaintiff-Appellee, :

v. :

THIRTEEN (13) GAMBLING DEVICES, :

Defendant-Appellant. :

- X



Bp/s

Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Whether the devices in question should be ruled exempt under 15 U.S.C. §1178.

2. Whether the legislative history of 15 U.S.C. §1171, et. seq., reflects that the machines in question, under the circumstances of this case, should not be subjected to forfeiture.

3. Whether the government should be required to prove wrongful intent on the part of claimant.

4. Whether the exemption contained in 15 U.S.C. §1172 applies to the defendant-devices.

STATEMENT OF FACTS

In 1974, appellant, Alexander Horner, was visiting London, England. While shopping for some antiques, Mr. Horner discovered the machines which are the subject of the case at bar. (Deposition of A. Horner, p. A-14). As a collector of antiques, Mr. Horner was interested in these machines not only for display in his own home, but also to give them to other collectors. (Deposition of A. Horner, p. A-15).

The devices in issue are described as follows: Exhibits 1-4 are what are commonly called "slot machines" or "one-armed bandits"; Exhibits 5-12 are automatic dice-tumbling machines which operate similarly to the "one-armed bandits"; Government Exhibit 13 was also a dice-tumbling machine though it operated in a manner distinctly different than Exhibits 1-12 (T. p. A-54 & A-55); Exhibits 16 and 17 were described as coins to be used in the machines (T. p. A-46 & A-47); and Exhibit 18 was described as a "slug" the size of a coin which could be used in Exhibits 1-12 (T. p. A-59).

None of the machines in question were manufactured after 1940. (Deposition of A. Horner, p. A-18). Exhibits 1-4 were manufactured by a company which no longer makes the machines nor the necessary parts. (Deposition of A. Horner, pp. A-17 & A-18). Similarly, the manufacturer of

Exhibits 5-12 is no longer in business and there are no parts available for these machines. (Deposition of A. Horner, p. A-19). None of the machines could be operated by the use of American coins. (T. p. A-72, A-77). Mr. Horner made a separate purchase of some antique "checks" or coins to use in the machines. (Deposition of A. Horner, p. A-16).

Mr. Horner paid $24.00 for each of the machines in question. (Deposition of A. Horner, p. A-15). He then decided to ship the machines to his home near Louisville, Kentucky.

At no time prior or subsequent to purchasing the machines was Mr. Horner informed that there was anything improper in shipping the machines to the United States. (Deposition of A. Horner, p. A-21). Mr. Horner made no attempt to disguise the machines. (Deposition of A. Horner, p. A-22). The bill of lading described the cargo as "thirteen antique gaming machines." (Deposition of A. Horner, p. A-22). The Government admitted that there was nothing improper about either the shipping invoice or the shipping affidavit signed by Mr. Horner. (T. p. A-39).

On June 26, 1974, U.S. customs agents seized the 13 antique gaming machines and checks. Subsequently, the Government brought the in rem proceeding against the 13 alleged gambling devices seeking forfeiture and destruction pursuant to 15 U.S.C. §1171 et. seq.

At the proceeding at bar, no evidence was presented to prove that Mr. Horner intended to use the machines for gambling purposes. Neither was it alleged by the Government that Mr. Horner intended to use the machines for gambling purposes.

PROCEDURAL HISTORY

This is an in rem proceeding brought by the United States of America against 13 alleged gambling devices pursuant to 15 U.S.C. §1177. The Government sought forfeiture of the alleged gambling devices in the U.S. District Court for the Southern District of New York. The Government as a basis for seeking forfeiture alleged violation of 15 U.S.C. §1171, et. seq.

Trial was held before Judge John M. Cannella on April 30, 1976. After considering the evidence as well as numerous pre-trial and post-trial memoranda submitted by both parties, the Court rendered its decision on July 29, 1976. The Court found that the 13 devices and accompanying slugs constituted gambling devices as defined by 15 U.S.C. §1172. The Court then ordered that the machines and slugs were to be forfeited to the United States and costs were assessed against the claimant, Alexander Horner, pursuant to 15 U.S.C. §1177.

It is from this decision that the claimant appeals.

ARGUMENT

POINT I

THE DEVICES IN QUESTION SHOULD BE RULED EXEMPT UNDER 15 U.S.C. §1178.

The Johnson Act, 15 U.S.C., et. seq. was amended in 1962 by the addition of §1178. This section provided in pertinent part:

> None of the provisions of this chapter shall be construed to apply ---
>
> ...(2) to any machine or mechanical device, such as a coin operated bowling alley, shuffleboard, marble machine (a so-called pin-ball machine), or mechanical gun, which is not designed and manufactured primarily for use in connection with gambling and (A) which when operated does not deliver, as a result of the application of an element of chance, any money or property, or (B) by the operation of which a person may not become entitled to receive, as the result of the application of an element of chance, any money, or property....

Claimant respectfully submits that the machines in question are exempt under §1178(2) because the machines at the time of seizure were not designed primarily for use in connection with gambling and were incapable of delivering money or property as required under this section. The condition at the time of seizure by the government should control and not the condition at the time when originally manufactured (1930's) or the condition subsequent to seizure.

Claimant's testimony reflects that the machines were purchased for amusement purposes or to be traded or given away to other antique collectors; that the machines were incapable of receiving any American coins; and that they could be operated only by the insertion of the metal discs or "cheques". (See Deposition of A. Horner, pp. A-15, A-22 & A-23). The government's "expert" confirmed these statements.

The "cheques" or tokens purchased separately from the machines by claimant and seized by the government are the only practical means by which the subject machines may be operated. (Deposition of A. Horner, p. A-16).

The present operating condition of the machines was relevant to the question of whether the machines fell within the exemption of §1178(2). The claimant's testimony reflects the fact that the machines "cannot be conceivably used as gambling devices because they would break down." (Deposition of A. Horner, pp. A-22 & A-23). In United States v. H.M. Branson Distributing Co., 398 F. 2d 929 (6th Cir. 1969), the Court of Appeals considered the question of operability to turn on the fact that in that case all that was required to convert the machines to gambling devices in full bloom was to effect a simple wiring adjustment "which could be accomplished in a short time -- from a few minutes to about twenty minutes." Supra, at 943.

In the instant case, the government expert witness admitted that three or four machines were not operable at the time of seizure. (T. p. A-74). Further, no proof was offered by the government as to the operability of the remaining machines or, more importantly, which specific machines, if any, were operable at all. (T. p. A-74). The government further conceded that even if operable, none of the machines could operate with American coins. (T. p. A-72). Apparently, the unspecified operable machines could only be operated by what the government called "slugs". (T. pp. A-71, A-73).

The machines in question were not capable of utilizing American coins. The machines could probably not have been operated for any length of time due to their antique condition. (Deposition of A. Horner, p. A-23). The claimant had no intent to use them as gambling devices. "It is elementary, for which the citation of authorities would be superfluous, that penal statutes must be strictly construed and that a forfeiture should be enforced only when within both the letter and the spirit of the law. The Johnson Act, being penal in character, must be strictly construed." (Emphasis added). United States v. One Electronic Pointmaker, 149 F. Supp. 427 (N.D. Ind. 1957).

Accordingly, claimant respectfully submits that the devices in question should be ruled exempt under §1178 and the finding by the trial court be reversed.

POINT II

THE LEGISLATIVE HISTORY REFLECTS THAT THE MACHINES, UNDER THE CIRCUMSTANCES OF THIS CASE, SHOULD NOT BE SUBJECTED TO FORFEITURE UNDER §1177, AND SHOULD BE EXEMPT UNDER 15 U.S.C. §1178.

The legislative history of the original Act, 1950 U.S. Code Cong. Service, p. 4240 and the 1962 Amendment, 1962 U.S. Code Cong. and Adm. News, p. 3809 clearly reflects that the subject machines should not be subjected to forfeiture pursuant to 15 U.S.C. §1177 and should be exempted under 15 U.S.C. §1178

"Those favoring enactment of the bill argued that Federal legislation was required to assist State and Local law-enforcement officers in the enforcement of State and local anti-gambling statutes. They pointed, particularly, to the existence of nation-wide crime syndicates which are securing a large share of their revenue from the operation of slot machines and other gambling machines." 1950 U.S. Code Cong. Service at p. 4243.

"As in the case of the original Johnson Act, the reported bill will assist the States to enforce their laws and to combat organized crime." 1962 U.S. Code and Adm. News, p. 3812.

"The purpose of the act was to lessen the revenue accruing to crime syndicates which according to testimony before the committee during the Eighty-first Congress were in control of the operation of

substantial numbers of these devices, and to assist the States in enforcing their laws which made the possession, sale or use of such gambling devices illegal. "Pinball and other machines, intended for amusement only, which award a limited number of free plays that are not convertible to money or other things of value, are not covered by this legislation." 1962 U.S. Code and Adm. News, p. 3811.

No allegation was made by the Government that claimant was in any way connected with a criminal gambling syndicate. Neither were allegations made nor evidence produced to prove that claimant intended to use the machines for gambling purposes. A review of the cases cited by the government will show that in virtually every case, whether an issue or not, the machines in question were to be used for gambling purposes. Forfeiture in those cases came within the spirit of the law.

In the present case, the machines were intended to be used by claimant as collector items and for his own amusement. (Deposition of A. Horner, p. A-22). The government witness admitted that the foreign machines in question were rare. (T. p. A-80). The rarity of the machines is evidenced by a post-trial affidavit submitted by William S. Brandt, Jr., Assistant U.S. Attorney for the Southern District of New York. In that affidavit, Mr. Brandt stated that the FBI had requested that certain of the machines not be destroyed pursuant to

Court order. Rather, the FBI, recognizing the unique character of the machines, specifically requested that Exhibits 1, 5, 6 and 7 be turned over to them to be put on display and for training purposes at the FBI Headquarters at the Hoover Building, and the FBI Academy in Quantico, Virginia. (See Affidavit of William S. Brandt, p. A-118 & A-119).

Claimant respectfully submits that the machines in question were purchased for similar reasons. He appreciated the unique value of the machines as well as their potential for trading to other antique collectors. Clearly, the Johnson Act was not intended to prevent the transport of thirty-nine year old machines which were incapable of being operated by American coins, were collected for amusement or antique purposes only, and were in various states of disrepair. A forfeiture should be enforced only when within both the letter and the spirit of the law. United States v. One Electronic Pointmaker, supra at 428.

Accordingly, appellant submits that the lower court decision should be overturned.

POINT III

THE GOVERNMENT SHOULD BE REQUIRED TO PROVE THE WRONGFUL INTENT OF THE POSSESSOR OR TRANSPORTER.

15 U.S.C. §1172 states that it is unlawful knowingly to transport gambling devices in interstate commerce although it shall not be unlawful to transport such devices into any state where the devices are lawful.

The entire justification for passage of the Johnson Act and its amendments was to lessen the revenue accruing to crime syndicates and to assist local anti-gambling statutes. See 1962 U.S. Code and Adm. News p. 3812 and 1950 U.S. Code Cong. Service at p. 4243. It is the use to which the possessor or manufacturer intends that was repugnant to Congress. There is nothing inherently dangerous or noxious about the machines and forfeiture cannot be condoned on any theory that the machines represent a threat to the health or safety of the public. In every case cited by the government there is evidence that claimant intended to use or was using the subject machines for "gambling purposes."

The government's view that the owner's intent is irrelevant regarding the operation of a forfeiture statute has been soundly criticized

by the United States Supreme Court as being violative of the Fifth Amendment. United States v. United States Coin and Currency, 91 S. Ct. 1041 (1971).

> ...We would first have to be satisfied that a forfeiture statute, with such a broad sweep, did not raise serious constitutional questions under that portion of the Fifth Amendment which commands that no person shall be "deprived of property, without due process of law-nor shall private property be taken for public use, without just compensation. United States Coin and Currency, supra, at p. 1044.

The Sixth Circuit in McKeehan v. United States, 438 F. 2d 739 (6th Cir. 1971), held that the imposition of a forfeiture in that case caused an unconstitutional deprivation of property without just compensation even though the claimant had probably violated the federal firearms statute. Three unregistered machine guns, kept as souvenirs by a private citizen, were seized by federal authorities pursuant to 26 U.S.C. §7321 (1964). The court, however, ruled against the government after determining that the seized property was not "per se contraband" and that there was no valid legislative, revenue or administrative reason to warrant the confiscation and concluded that the outcome of forfeiture contests may be determined with reference to the owner's guilt or innocence. McKeehan, supra, at pp. 743 and 745.

There is a difference between "per se contraband" (possession of which is illegal under all circumstances) and "derivative contraband" (property which is made illegal by wrongful use). One Plymouth Sedan v. Pennsylvania, 380 U.S. 693, at 699.

The government's contention that seizure and forfeiture do not require a finding of owner's specific intent to violate a law is inconsistent with the government's own administrative regulations relative to administrative remission or mitigation of property which is decided on the basis of whether or not a claimant had knowledge or reason to believe that the property would be used in violation of law See 28 CFR §§1 and 9.5.*

*To date the claimant has not received official written decision on the Petition for Remission filed with the Department of Justice on December 12, 1974.

POINT IV

THE EXEMPTION CONTAINED IN 15 U.S.C. §1172 IS APPLICABLE.

§1172, specifically provides that it is not unlawful to transport any gambling device into any state in which the transported gambling device is legal.

§1172 of the Act provides:

> That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any state in which the transported gambling device is specifically enumerated as lawful in a statute of that state.

At the time of the intended transportation to Kentucky in July of 1974, Kentucky law was clear that mere possession of slot machines did not violate state law. In Commonwealth v. Sloan, 219 S.W. 2d 966, (Ky. 1949), the defendant was charged with violating KRS 436.230, by setting up, keeping, managing and operating a slot machine in his place of business. The Kentucky Court of Appeals stated,

> "We are convinced that the definition given to the word 'keep' in these gambling laws by our sister courts and by this court is the Burns Case, supra, is correct and in accord with what the legislature evidently intended by the language it employed in this statute, and, inasmuch as in the instant case there is nothing shown against the defendants beyond mere possession of these slot machines, and no proof that they intended to set up, manage, operate, or conduct them as gaming devices anywhere, the court should have peremptorily instructed the jury to find them not guilty."

Commonwealth v. Sloan, supra, at page 967. Also, see, Haycraft v. Commonwealth, 49 S.W. 2d 314 (Ky. 1932).

Accordingly, possession or receipt in Kentucky of the devices would not violate Kentucky law and the exclusion contained in §1172 is applicable. There can be no argument that Kentucky law rather than New York law should apply. The law of the ultimate situs of the interstate transportation controls. See 1950 U.S. Code Cong. Service, p. 4247. Also, C. F. Clark Distilling Co. v. Western Maryland Railway, 242 U.S. 311 (1917).

In United States v. Various Gambling Devices, 368 F. Supp. 661 (N.D. Miss. 1973), the government sought forfeiture of certain devices on the grounds that they were gambling devices within the meaning of 15 U.S.C. §1171 and were used or possessed by persons engaged in the business of repairing, reconditioning, etc. without having first registered with the Attorney General as required by 15 U.S.C. §1173(a)(3). The Court held,

> "Since the forfeiture of the pinball machines in the present proceedings are based upon the failure to register them under §1173(a)(3), and not for unlawful interstate transportation under §1172, the fact that so-called "free-game" pinball machines are legal under Mississippi law is of no consequence. That the machines may be lawful under state law does not render them exempt from the registration and record keeping requirements of §1173. It is only where forfeiture is based upon §1172, because of the express exemption contained therein, that the

> legal status of a device such as a free game pinball machine specifically sanctioned by the statute of the state into which the device is transported becomes material. Supra, at pp. 663-664.

Since Kentucky Court of Appeals has held that KRS 436.230 does not explicitly prohibit possession of slot machines, the exception contained in §1172 applies and the Court must sustain Defendant's Motion for a Directed Verdict. To allow seizure and forfeiture under these facts would constitute a flagrant violation of basic justice.

CONCLUSION

In view of the foregoing authorities and arguments, the Judgment of the Trial Court should be reversed.

Respectfully submitted,

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Attorney for Defendant-Appellant

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Date 1/19/77

Firm U.S. Attorney

By _____

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